

Nov 01, 2019

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

SCOTT S.,¹

Plaintiff,

v.
ANDREW M. SAUL, the Commissioner
of Social Security,²

Defendant.

No. 4:18-CV-05162-EFS

**ORDER GRANTING
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT AND
DENYING PLAINTIFF'S MOTION
FOR SUMMARY JUDGMENT**

Before the Court, without oral argument, are cross-summary-judgment motions, ECF Nos. 11 & 12. Plaintiff Scott S. appeals the Administrative Law Judge's (ALJ) denial of benefits.³ Plaintiff contends the ALJ erred by: (1) improperly rejecting the opinions of Plaintiff's medical providers; (2) improperly rejecting Plaintiff's subjective testimony; and (3) failing to meet her step five burden.⁴ Plaintiff further contends that the Appeals Council erred by denying Plaintiff's request for review when Plaintiff submitted additional evidence after the ALJ issued her

¹ To protect the privacy of social-security plaintiffs, the Court refers to them by first name and last initial. *See* LCivR 5.2(c). When quoting the Administrative Record in this order, the Court will substitute "Plaintiff" for any other identifier that was used.

² Andrew M. Saul is now the Commissioner of the Social Security Administration. Accordingly, the Court substitutes Andrew M. Saul as the Defendant. *See* Fed. R. Civ. P. 25(d).

³ ECF No. 1.

⁴ ECF No. 11 at 8.

1 decision.⁵ The Commissioner of Social Security (“Commissioner”) asks the Court to
2 affirm the ALJ’s decision.⁶ After reviewing the record and relevant authority, the
3 Court is fully informed. For the reasons set forth below, the Court grants the
4 Commissioner’s Motion for Summary Judgment and denies Plaintiff’s Motion for
5 Summary Judgment.

6 **I. Standard of Review**

7 On review, the Court must uphold the ALJ’s determination that the claimant
8 is not disabled if the ALJ applied the proper legal standards and there is substantial
9 evidence in the record as a whole to support the decision.⁷ “Substantial evidence
10 means more than a mere scintilla, but less than a preponderance. It means such
11 relevant evidence as a reasonable mind might accept as adequate to support a
12 conclusion.”⁸ The Court will also uphold “such inferences and conclusions as the
13 [ALJ] may reasonably draw from the evidence.”⁹

14 In reviewing a denial of benefits, the Court considers the record as a whole,
15 not just the evidence supporting the ALJ’s decision.¹⁰ That said, the Court may not
16 substitute its judgment for that of the Commissioner. If the evidence supports more
17 than one rational interpretation, a reviewing court must uphold the ALJ’s decision.¹¹
18 Further, the Court “may not reverse an ALJ’s decision on account of an error that is

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20 ⁵ *Id.*

21 ⁶ ECF No. 12.

22 ⁷ *Delgado v. Heckler*, 722 F.2d 570, 572 (9th Cir. 1983) (citing 42 U.S.C. § 405(g)); *Brawner v. Sec’y of Health & Human Servs.*, 839 F.2d 432, 433 (9th Cir. 1987).

23 ⁸ *Desrosiers v. Sec’y of Health & Human Servs.*, 846 F.2d 573, 576 (9th Cir. 1988) (citations and internal quotation marks omitted).

⁹ *Mark v. Celebreeze*, 348 F.2d 289, 293 (9th Cir. 1965).

¹⁰ *Weetman v. Sullivan*, 877 F.2d 20, 22 (9th Cir. 1989).

¹¹ *Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1984).

1 harmless.”¹² An error is harmless “where it is inconsequential to the [ALJ’s] ultimate
2 nondisability determination,”¹³ and where the reviewing court “can confidently
3 conclude that no reasonable ALJ, when fully crediting the testimony, could have
4 reached a different disability determination.”¹⁴

5 **II. Facts, Procedural History, and the ALJ’s Findings**¹⁵

6 Plaintiff Scott S. is 51 years old and lives in Kennewick, Washington. Plaintiff
7 filed an application for supplemental security income on December 16, 2014, alleging
8 a disability onset date of January 1, 1998.¹⁶ Sometime thereafter, Plaintiff amended
9 his alleged onset date to December 16, 2014, the date of his application.¹⁷ Plaintiff’s
10 claim was denied initially and upon reconsideration.¹⁸ Plaintiff requested a hearing
11 before an ALJ which was held on May 18, 2017.¹⁹ Plaintiff, impartial medical expert
12 Steven Goldstein, M.D., and an impartial vocational expert appeared and testified
13 at the hearing.²⁰ On August 23, 2017, ALJ Lori L. Freund rendered a decision
14 denying Plaintiff’s claim.²¹

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19 ¹² *Molina v. Astrue*, 674 F.3d 1104, 1111 (9th Cir. 2012).

20 ¹³ *Id.* at 1115 (quotations and citation omitted).

21 ¹⁴ *Marsh v. Colvin*, 792 F.3d 1170, 1173 (9th Cir. 2015) (citation omitted).

22 ¹⁵ The facts are only briefly summarized. Detailed facts are contained in the administrative
hearing transcript, the ALJ’s decision, and the parties’ briefs.

23 ¹⁶ AR 15.

¹⁷ AR 22.

¹⁸ AR 15.

¹⁹ *Id.*

²⁰ *Id.*

²¹ AR 28.

1 At step one,²² the ALJ found Plaintiff had not engaged in substantial gainful
2 activity since December 16, 2014, the application date.²³

3 At step two, the ALJ found Plaintiff had the following severe medical
4 impairments: degenerative disc disease—lumbar spine; morbid obesity; diabetes
5 mellitus with neuropathy; history of right ankle fracture, status post open reduction
6 internal fixation; episodic venous stasis dermatitis; and history of bilateral carpal
7 tunnel syndrome, status post right wrist release surgery.²⁴

8 At step three, the ALJ found Plaintiff did not have an impairment that met
9 the severity of a listed impairment.²⁵

10 At step four, the ALJ found Plaintiff had the residual functional capacity
11 (RFC) to perform light work.²⁶ The ALJ found Plaintiff could stand and/or walk
12 approximately six hours and sit at least six in an eight hour day, with normal breaks
13 every two hours.²⁷ He could also: push and/or pull within the weight restrictions of
14 light exertion; occasionally balance, stoop, kneel, crouch, crawl, and climb ramps or
15 stairs; and never climb ladders, ropes, or scaffolds.²⁸ He should avoid unprotected
16 heights and exposure to airborne irritants, hazards or hazardous machinery, and

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20 ²² The applicable five-step disability determination process is set forth in the ALJ's decision, AR 16–
21 17, and the Court presumes the parties are well acquainted with that standard process. As such,
22 the Court does not restate the five-step process in this order.

23 ²³ AR 17.

24 ²⁴ AR 17–18.

25 ²⁵ AR 19.

26 ²⁶ AR 21.

27 ²⁷ *Id.*

28 ²⁸ *Id.*

1 excessive, industrial-type vibration.²⁹ He can frequently handle with the left, non-
2 dominant, upper extremity.³⁰

3 In reaching these conclusions, the ALJ found Plaintiff's medically
4 determinable impairments could reasonably be expected to cause the alleged
5 symptoms.³¹ However, the ALJ found Plaintiff's statements regarding the intensity,
6 persistence, and limiting effects of these symptoms were not entirely consistent with
7 the evidence presented in the record.³²

8 When determining Plaintiff's RFC, the ALJ examined several opinions by
9 both acceptable and non-acceptable medical sources. When evaluating Plaintiff's
10 physical impairments, the ALJ afforded little weight to treating physician Dr. David
11 Jones' October 2016 opinion and some weight to his May 2017 opinion.³³ He assigned
12 little weight to non-examining physician Dr. Brent Packer, and some weight to
13 Dr. Travis Peterson.³⁴ He further assigned some weight to state agency evaluators
14 Dr. Jacqueline Farwell and Dr. Olegario Ignacio, Jr, as well as Nurse Joseph
15 Poston.³⁵ He assigned little weight to Dr. Meneleo Lilligan.³⁶ Finally, he assigned
16 great weight to testifying expert Dr. Steven Goldstein, who reviewed the record in
17 its entirety, and Dr. James Opara, an examining physician.³⁷

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²⁹ *Id.*

³⁰ *Id.*

³¹ AR 22.

³² *Id.*

³³ AR 25–26.

³⁴ AR 25.

³⁵ AR 26.

³⁶ AR 23.

³⁷ AR 23–24, 26.

At step five, the ALJ found Plaintiff was not able to perform any past relevant work, including his jobs as an apartment manager, commercial cleaner, and laborer.³⁸ However, given his age, education, work experience, and RFC, the ALJ found there exist significant numbers of jobs that Plaintiff could perform.³⁹

The ALJ issued her decision to deny Plaintiff benefits on August 23, 2017.⁴⁰ The Appeals Council denied Plaintiff's request for review,⁴¹ making the ALJ's decision the Commissioner's final decision for the purposes of judicial review.⁴² Plaintiff filed this lawsuit on October 9, 2018.⁴³

III. Applicable Law & Analysis

A. The ALJ properly weighed the opinions of Plaintiff's treating and non-examining physicians.

Plaintiff alleges that the ALJ improperly weighed treating physician Dr. Jones' October 2016 and May 2017 reports, as well as non-examining physician Dr. Packer's report. The Court finds the ALJ appropriately discounted both physicians for reasons supported by substantial evidence in the record. “[W]hatever the meaning of ‘substantial’ in other contexts, the threshold for such evidentiary sufficiency is not high . . . It means—and means only—such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”⁴⁴

38 AR 27.

39 *Id.*

40 AR 28.

41 AR 1.

⁴² See 42 U.S.C. § 1383(c)(3); 20 C.F.R. §§ 416.1481, 422.210.

43 ECF No. 1.

⁴⁴ *Biestek v. Berryhill*, 139 S. Ct. 1148, 1154 (2019) (citations omitted).

1 **1) Dr. David Jones**

2 Treating physicians' opinions are generally assigned greater weight than non-
3 treating physicians.⁴⁵ However, if the opinions of the treating and non-treating
4 physicians contradict, the opinion of the treating physician may be rejected only if
5 the ALJ articulates "specific, legitimate reasons for doing so that are based on
6 substantial evidence in the record."⁴⁶ Although a non-treating physician's opinion
7 on its own may not constitute "substantial evidence," an ALJ may reject a treating
8 physician's opinion if it conflicts with "the overwhelming weight of the other evidence
9 of record."⁴⁷

10 Dr. Jones' opinions were contradicted by evidence from non-examining
11 physician Dr. Goldstein, who testified that Plaintiff could perform a light range of
12 work,⁴⁸ and examining physician Dr. Opara, who opined that Plaintiff could perform
13 a medium range of work.⁴⁹ Accordingly, the ALJ need only provide specific and
14 legitimate reasons for discounting Dr. Jones' testimony. The Court finds that these
15 are specific and legitimate reasons supported by substantial evidence within the
16 record.

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21 ⁴⁵ *Andrews v. Shalala*, 53 F.3d 1035, 1041–42 (9th Cir. 1995).

22 ⁴⁶ *Jamerson v. Chater*, 112 F.3d 1064, 1066 (9th Cir. 1997) (internal quotations omitted).

23 ⁴⁷ *Lester v. Chater*, 81 F.3d 821, 831 (9th Cir. 1996).

⁴⁸ AR 64.

⁴⁹ AR 386–90. See also AR 24 (ALJ finding that Dr. Opara's report was consistent with medium workload).

i. October 2016 opinion

The ALJ rejected Dr. Jones' October 2016 opinion because (1) Dr. Jones' own objective findings conflict with his opinion of severe limitation; and (2) Plaintiff's self-reported activities are inconsistent with such a restriction.⁵⁰

An ALJ may reject a treating physician's opinion if the opinion conflicts with the physician's treatment notes and objective findings.⁵¹ In October 2016, Dr. Jones examined Plaintiff before filing a disability report.⁵² Dr. Jones found that despite Plaintiff's complaints of "significant burning" and cramping in his bilateral feet,⁵³ Plaintiff had normal range of motion and muscle tone and had no deformities in his feet.⁵⁴ He had lighter and atypical sensation in his feet but was still able to sense all eight sites.⁵⁵ Notably, Dr. Jones also wrote that gabapentin helped Plaintiff with his pain.⁵⁶ Dr. Jones ultimately concluded: "Result: normal."⁵⁷

After conducting his physical examination, Dr. Jones opined that Plaintiff's right ankle pain and history of fracture would cause "mild" or "no significant interference" with Plaintiff's ability to perform one or more work-related activities.⁵⁸ He further endorsed that Plaintiff would have "moderate" or "significant interference" with his ability to perform one or more basic work-related activities.

50 AR 25.

⁵¹ *Ghanim v. Colvin*, 763 F.3d 1154, 1161 (9th Cir. 2014); *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005).

52 *See AR 459-72.*

53 AR 463.

54 AR 464.

55 *Id.*

56 AR 463.

57 AR 464.

58 AR 460.

1 due to his bilateral feet pain, back pain with sciatica, and peripheral neuralgia.⁵⁹
2 However, despite these mild and moderate limitations and “normal” objective
3 findings, Dr. Jones opined that Plaintiff would be “severely limited” in his ability to
4 work, meaning Plaintiff would be “unable to meet the demands of sedentary work.”⁶⁰
5 The ALJ reasonably found the opinion unreliable due to these inconsistencies.

6 The ALJ further found that Plaintiff’s self-reported activities were
7 inconsistent with Dr. Jones’ “severely limited” restrictions.⁶¹ An ALJ may discount
8 a medical opinion that is “inconsistent with the level of activity” reported by the
9 claimant.⁶² Substantial evidence exists to support the ALJ’s reasoning.

10 First, although Dr. Jones marked that Plaintiff would be “unable to meet the
11 demands of sedentary work,” Plaintiff had told physicians that he was “very busy”
12 despite being unemployed.⁶³ Plaintiff also told his physician in June 2016 that
13 despite his back and shoulder pain he “frequently works under his car and is in a
14 strained position under the car.”⁶⁴ He testified in the administrative hearing that
15 although it is difficult now for him to get under the car he still will “get under the
16 hood and work on the motor.”⁶⁵ He also does yard work, mows the lawn, goes grocery
17 shopping “when needed,” and drives himself to appointments.⁶⁶ He does chores
18 around the house such as “cleaning, sweeping, and mopping,”⁶⁷ and stated he is

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20 ⁵⁹ *Id.*

21 ⁶⁰ AR 461.

22 ⁶¹ AR 25.

23 ⁶² *Rollins v. Massanari*, 261 F.3d 853, 856 (9th Cir. 2001).

⁶³ AR 516.

⁶⁴ AR 617.

⁶⁵ AR 81.

⁶⁶ AR 386–87, 506.

⁶⁷ AR 387.

1 “pretty efficient” when making meals, noting that the time it takes him to is
2 “average, if not quicker than most.”⁶⁸ He also stated he could walk three quarters of
3 a mile to one mile before needing to stop and rest, but noted he would be sore later
4 if he did so.⁶⁹ Plaintiff’s self-reported activities undermine Dr. Jones’ opinion that
5 Plaintiff is incapable of performing even sedentary work. Accordingly, the ALJ did
6 not improperly reject Dr. Jones’ October 2016 opinion.

7 ii. May 2017 opinion

8 The ALJ assigned some weight to Dr. Jones’ May 2017 opinion because it was
9 inconsistent with (1) Dr. Jones’ own internal findings; (2) Dr. Jones’ objective
10 medical findings; and (3) Plaintiff’s self-reported activities.⁷⁰ The ALJ also
11 discredited Dr. Jones’ opinion because it relied more on Plaintiff’s self-reported
12 complaints.⁷¹

13 An ALJ may reject a physician’s opinion that contains internal
14 inconsistencies.⁷² In the May 2017 opinion, Dr. Jones stated that Plaintiff would be
15 able to perform sedentary work due to his limitations,⁷³ which the ALJ found to be
16 internally inconsistent with other parts of the opinion.⁷⁴ For example, Dr. Jones
17 opined that Plaintiff would miss most of a normal work week due to pain, yet he
18 opined that Plaintiff could “anticipate returning to work with a more skilled trade”

20 68 AR 257.
21 69 AR 260.
22 70 AR 26.
23 71 *Id.*
24 72 *Morgan v. Comm’r of Soc. Sec. Admin.*, 169 F.3d 595, 603 (9th Cir. 1999).
25 73 AR 700.
26 74 AR 26.

1 and was capable of performing sedentary work.⁷⁵ These internal inconsistencies are
2 specific and legitimate reasons to reject a physician's finding.⁷⁶ Nevertheless, the
3 Court notes that the ALJ accounted for Dr. Jones' assessment of Plaintiff's handling
4 limitations in the RFC.⁷⁷

5 Additionally, the ALJ properly weighed Dr. Jones' opinion because it relied
6 heavily on Plaintiff's self-reported complaints. "If a treating provider's opinions are
7 based to a large extent on an applicant's self-reports and not on clinical evidence,
8 and the ALJ finds the applicant not credible, the ALJ may discount the treating
9 provider's opinion."⁷⁸ As Dr. Jones' previous notes reflect a "normal" objective
10 assessment,⁷⁹ his findings regarding Plaintiff's pain were almost entirely due to
11 Plaintiff's own self-reports. As analyzed *infra*, the ALJ properly found Plaintiff's
12 complaints about his symptoms to not be credible. Accordingly, this was a specific
13 and legitimate reason to discredit the opinion.

14 Finally, as analyzed *supra*, Dr. Jones' objective findings and treatment
15 records as well as Plaintiff's self-reported activities are inconsistent with Dr. Jones'
16 findings that Plaintiff is limited to sedentary work. The ALJ therefore appropriately
17 weighed Dr. Jones' May 2017 opinion.

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20 ⁷⁵ AR 700.

21 ⁷⁶ *Morgan*, 169 F.3d at 603; *Rollins*, 261 F.3d at 856. See also, e.g., *Khan v. Colvin*, No. EDCV 12-
22 2106-MAN, 2014 WL 2865173 at *7 (C.D. Cal. Jun. 24, 2014) (an ALJ's finding that a physician's
opinion was internally inconsistent "is specific and legitimate").

⁷⁷ See AR 26.

⁷⁸ *Ghanim*, 763 F.3d at 1162 (internal quotations omitted).

⁷⁹ See AR 464.

2) Dr. Brent Packer

Non-examining physicians carry the least weight of all physicians.⁸⁰ Even so, state agency medical and psychological consultants are “highly qualified medical sources who are also experts in the evaluation of medical issues in disability claims under the Act.”⁸¹ ALJs must consider their opinions and “articulate how they considered them in the decision.”⁸² To reject the opinion of a non-examining physician, the ALJ must refer to “specific evidence in the medical record.”⁸³ However, the ALJ need not repeat the specific evidence in multiple parts of the opinion, so long as “the agency’s path [of analysis] may reasonably be discerned.”⁸⁴

The ALJ rejected Dr. Packer’s opinion because Dr. Packer “reviewed Dr. Jones’ [October 2016] opinion and stated that [Plaintiff’s] conditions actually caused him greater limitations than what Dr. Jones believed, but his opinion is even less supported by the record.”⁸⁵ The ALJ did not cite any medical evidence when addressing Dr. Packer’s opinion specifically.⁸⁶ However, the ALJ cited specific medical evidence when refuting Dr. Jones’ October 2016 opinion on which Dr. Packer’s opinion is based.⁸⁷ Because the ALJ appropriately discounted Dr. Jones’ October 2016 opinion that held fewer limitations than Dr. Packer’s, the ALJ did not err in discounting Dr. Packer’s opinion.

⁸⁰ *Garrison v. Colvin*, 759 F.3d 995, 1012 (9th Cir. 2014).

81 SSR 17-2p.

82 *Id.*

⁸³ *Sousa v. Callahan*, 143 F.3d 1240, 1244 (9th Cir. 1998).

⁸⁴ *Molina*, 674 F.3d at 1121 (internal quotations omitted).

85 AR 25.

86 *See id.*

⁸⁷ See *id.* (citing AR 463–64).

1 **B. The ALJ properly discredited Plaintiff's subjective complaints.**

2 Plaintiff argues the ALJ offered improper reasons for discrediting Plaintiff's
3 subjective complaints and testimony regarding the severity of his symptoms.⁸⁸ The
4 ALJ engages in a two-step analysis to determine whether a claimant's testimony
5 regarding subjective pain or symptoms is credible.⁸⁹ "First, the ALJ must determine
6 whether there is objective medical evidence of an underlying impairment which
7 could reasonably be expected to produce the pain or other symptoms alleged."⁹⁰ In
8 the present case, because the ALJ determined Plaintiff's medical impairment could
9 "reasonably be expected to produce the above alleged symptoms," he has met step
10 one.⁹¹

11 "If the claimant meets the first test and there is no evidence of malingering,
12 the ALJ can only reject the claimant's testimony about the severity of the symptoms
13 if [the ALJ] gives 'specific, clear and convincing reasons' for the rejection."⁹² The ALJ
14 must make sufficiently specific findings "to permit the court to conclude that the ALJ
15 did not arbitrarily discredit [the] claimant's testimony."⁹³ General findings are
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21 ⁸⁸ ECF No. 11 at 16–18.

22 ⁸⁹ *Molina*, F.3d at 1112.

23 ⁹⁰ *Id.* (internal quotations and citations omitted).

21 ⁹¹ AR 22.

22 ⁹² *Ghanim*, 763 F.3d at 1163 (quoting *Lingenfelter v. Astrue*, 504 F.3d 1028, 1036 (9th Cir. 2007)).

23 ⁹³ *Tommasetti v. Astrue*, 533 F.3d 1035, 1039 (9th Cir. 2008) (citation and quotations omitted).

1 insufficient.⁹⁴ Courts may not second-guess ALJ findings that are supported by
2 substantial evidence.⁹⁵

3 In making an adverse credibility determination, the ALJ may consider, among
4 other things, (1) the claimant's reputation for truthfulness; (2) inconsistencies in the
5 claimant's testimony or between his testimony and his conduct; (3) the claimant's
6 daily living activities; (4) the claimant's work record; and (5) the nature, severity,
7 and effect of the claimant's condition.⁹⁶

8 Substantial evidence exists to show Plaintiff's allegations were inconsistent
9 with the objective medical evidence. Although Plaintiff complained of chronic and
10 severe pain in his ankle and legs⁹⁷ and stated he could not sit for longer than 10
11 minutes at a time,⁹⁸ he regularly presented to physicians as being in "no acute
12 distress" and was able to ambulate "with no assistance" despite an abductory and
13 antalgic gait.⁹⁹ Plaintiff is also capable of walking on his heels and toes.¹⁰⁰ Despite
14 some tenderness and swelling, he consistently demonstrated normal range of
15 motion¹⁰¹ and had presented negative straight leg raises in both seated and supine
16 positions, with no muscle spasms.¹⁰² Additionally, Plaintiff's November 2015 MRI
17 results showed only "moderate disk space narrowing at L5-S1" that "could be causing

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19 ⁹⁴ *Lester*, 81 F.3d at 834.

20 ⁹⁵ *Thomas v. Barnhart*, 278 F.3d 947, 959 (9th Cir. 2002).

21 ⁹⁶ *Id.* at 958–59.

22 ⁹⁷ *See, e.g.*, AR 350, 463.

23 ⁹⁸ AR 479.

24 ⁹⁹ *See* AR 388, 440, 444. *See also Rollins*, 261 F.3d at 856 (presenting with "no acute distress" and
25 other benign findings and recommendations is inconsistent with a finding of total disability).

26 ¹⁰⁰ AR 388.

27 ¹⁰¹ *See, e.g.*, AR 392, 443, 464.

28 ¹⁰² AR 388.

1 irritation" but had no nerve compression, as well as "mild degenerative disk disease"
2 at L4-L5 that "does not cause canal stenosis or nerve root compression."¹⁰³

3 Plaintiff presented in April 2015 for an evaluation of his alleged carpal tunnel
4 syndrome, wherein he demonstrated a grip strength of 5/5 and was able to tie his
5 shoes and pick up small and large objects with no issue.¹⁰⁴ His Phalen's and Tinel's
6 signs were negative.¹⁰⁵ However, only two weeks later, Plaintiff was seen by another
7 physician and complained that his carpal tunnel syndrome caused him "moderate"
8 symptoms and resulted in "decreased grip strength" and "difficulty with grasping."¹⁰⁶
9 He claimed he had been experiencing these symptoms for 20 years.¹⁰⁷ Plaintiff's
10 allegations regarding his carpal tunnel syndrome are inconsistent with objective
11 medical evidence.

12 Further, as analyzed *supra*, the ALJ properly found that Plaintiff's self-
13 reported activities conflicted with the objective medical evidence, as well as
14 Plaintiff's symptom allegations.¹⁰⁸ Plaintiff's activities—including working with his
15 car and in the yard as well as his ability to walk three quarters of a mile to a mile—
16 are inconsistent with the limitations he has alleged due to his back, leg, and wrist

21 ¹⁰³ AR 566.
22 ¹⁰⁴ AR 386, 388.
23 ¹⁰⁵ AR 388.
24 ¹⁰⁶ AR 413.
25 ¹⁰⁷ *Id.*
26 ¹⁰⁸ See *Molina*, 674 F.3d at 1112–13.

1 pain, and are “physical functions that are transferable to a work setting.”¹⁰⁹

2 Accordingly, the ALJ properly discredited Plaintiff for this reason.

3 Finally, substantial evidence shows that Plaintiff’s symptoms resolved with
4 treatment, and impairments that can be controlled effectively with medication are
5 not disabling.¹¹⁰ In October 2016 Plaintiff wrote that he experienced “uncontrollable
6 chronic pain.”¹¹¹ However, multiple physicians had remarked that his leg pain was
7 improved by taking gabapentin and other pain medications.¹¹² Additionally, Plaintiff
8 underwent carpal tunnel release surgery in his right hand in February 2016¹¹³ after
9 complaining primarily of ongoing numbness and tingling in his right hand.¹¹⁴ After
10 the surgery, Plaintiff reported that the numbness in his hand had “completely
11 resolved.”¹¹⁵ Although he reported he experienced “some” aching and pain in his
12 right hand, his physician informed him the pain would gradually resolve over
13 time.¹¹⁶ His physician also recommended therapy to assist in the pain, which
14 Plaintiff declined.¹¹⁷ Failure to seek treatment may also be relied on to discredit a
15 claimant’s alleged symptoms, as it suggests the Plaintiff’s symptoms may not be as

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20 ¹⁰⁹ *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989).

21 ¹¹⁰ *Warre v. Comm’r of Soc. Sec. Admin.*, 439 F.3d 1001, 1006 (9th Cir. 2006).

22 ¹¹¹ AR 459.

¹¹² See, e.g., AR 463, 513, 517, 627.

¹¹³ AR 675.

¹¹⁴ AR 689.

¹¹⁵ AR 675.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

1 significant as alleged.¹¹⁸ Accordingly, for the aforementioned reasons, the ALJ
2 properly discounted Plaintiff's subjective testimony.

3 **C. The ALJ did not err at step five.**

4 At step five, the ALJ has the burden to identify specific jobs existing in
5 substantial numbers in the national economy that claimant can perform despite
6 their identified limitations.¹¹⁹ At an administrative hearing, an ALJ may solicit
7 vocational expert testimony as to the availability of jobs in the national economy.¹²⁰
8 A vocational expert's testimony may constitute substantial evidence of the number
9 of jobs that exist in the national economy.¹²¹ The ALJ's decision regarding the
10 number of alternative occupations must be supported by substantial evidence.¹²²

11 Plaintiff argues that the ALJ's hypothetical failed to take into account the
12 limitations set forth by his providers.¹²³ However, this argument merely restates
13 Plaintiff's earlier allegations of error, which are not supported by the record.
14 Accordingly, the ALJ's hypothetical properly accounted for the limitations supported
15 by the record.¹²⁴

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20 ¹¹⁸ *Fair*, 885 F.2d at 604.

21 ¹¹⁹ *Johnson v. Shalala*, 60 F.3d 1428, 1432 (9th Cir. 1995); *see also* 20 C.F.R. § 416.920(g).

22 ¹²⁰ *Tackett v. Apfel*, 180 F.3d 1094, 1100–01 (9th Cir. 1999).

23 ¹²¹ *See Bayliss*, 427 F.3d at 1218.

¹²² *Hill v. Astrue*, 698 F.3d 1153, 1161–62 (9th Cir. 2012).

¹²³ ECF No. 11 at 19–20.

¹²⁴ *See Magallanes v. Bowen*, 881 F.2d 747, 756–57 (9th Cir. 1989) (holding it is proper for the ALJ to limit a hypothetical to those restrictions supported by substantial evidence in the record).

1 **D. The evidence submitted to the Appeals Council after the ALJ issued
2 her decision does not undermine the substantial evidence supporting
3 the ALJ's decision.**

4 Plaintiff alleges that two pieces of evidence submitted after the ALJ's decision
5 warrant a finding of disabled or remand.¹²⁵ Plaintiff submitted two pieces of
6 evidence: (1) a statement from Dr. Jones stating that Plaintiff could not work dated
7 October 6, 2017; and (2) an MRI report dated August 3, 2017.¹²⁶ The Appeals Council
8 considered the new evidence and found it did not change the outcome of the ALJ's
9 decision, therefore it denied Plaintiff's request for review.¹²⁷

10 "When the Appeals Council denies a request for review, it is a non-final agency
11 action not subject to judicial review because the ALJ's decision becomes the final
12 decision of the Commissioner," subject to a substantial evidence review based on the
13 record as a whole.¹²⁸ However, evidence submitted for the first time to the Appeals
14 Council becomes part of the administrative record, which the Court must consider
15 "in determining whether the Commissioner's decision is supported by substantial
16 evidence."¹²⁹

17 The Court finds that the new evidence submitted by Plaintiff does not
18 undermine the substantial evidence supporting the ALJ's decision. First, the Court
19 agrees that Dr. Jones' letter generally repeated Dr. Jones' prior opinions that
20 Plaintiff could not work due to his conditions,¹³⁰ and the ALJ properly weighed Dr.

21 ¹²⁵ ECF No. 11 at 18–19.

22 ¹²⁶ AR 34–36.

23 ¹²⁷ AR 2.

24 ¹²⁸ *Taylor v. Comm'r of Soc. Sec. Admin.*, 659 F.3d 1228, 1231 (9th Cir. 2011).

25 ¹²⁹ *Brewes v. Comm'r of Soc. Sec. Admin.*, 682 F.3d 1157, 1159–60 (9th Cir. 2012).

26 ¹³⁰ AR 34.

1 Jones' opinions that state the same. Accordingly, the new letter fails to undermine
2 substantial evidence supporting the ALJ's opinion.

3 The Court similarly finds that the submitted MRI report does not undermine
4 the substantial evidence. Although Plaintiff is correct that the 2017 MRI reflects a
5 new disc protrusion in Plaintiff's L4-L5, the physician concluded that "overall, there
6 appears to be mild spinal canal narrowing and mild bilateral neural foraminal
7 narrowing" in L4-L5.¹³¹ The physician also stated that the findings in L5-S1 "appear
8 unchanged" from prior imaging and still reflected "mild spinal canal narrowing" and
9 "mild-to-moderate bilateral neural foraminal narrowing."¹³² Even with the disc
10 protrusion, the 2017 MRI results are not significantly different from the 2015 MRI
11 as they still reflect overall "mild" and "mild-to-moderate" findings.¹³³ The ALJ
12 discussed the 2015 MRI findings and considered them in his opinion.¹³⁴ Accordingly,
13 the 2017 MRI report does not undermine the substantial evidence supporting the
14 ALJ's decision.

15 **IV. Conclusion**

16 Having reviewed the ALJ's findings and the record as a whole, the Court
17 concludes that the ALJ did not err in weighing medical opinions, rejecting Plaintiff's
18 subjective testimony, or in issuing findings at step five. The Appeals Council did not
19 err when denying reconsideration.

20 //

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22 ¹³¹ AR 36.

¹³² *Id.*

¹³³ Compare AR 35-36 and AR 566.

¹³⁴ See AR 24.

1 Accordingly, **IT IS HEREBY ORDERED:**

2 1. The Clerk's Office is directed to substitute Andrew M. Saul, the
3 Commissioner of Social Security, as the Defendant.

4 2. Plaintiff's Motion for Summary Judgment, **ECF No. 11**, is **DENIED**.

5 3. The Commissioner's Motion for Summary Judgment, **ECF No. 12**, is
6 **GRANTED**.

7 4. The Clerk's Office is to enter **JUDGMENT** in favor of Defendant.

8 5. The case shall be **CLOSED**.

9 **IT IS SO ORDERED.** The Clerk's Office is directed to enter this Order and
10 provide copies to all counsel.

11 **DATED** this 1st day of November 2019.

12 _____
13 s/Edward F. Shea
14 EDWARD F. SHEA
15 Senior United States District Judge
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